ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Versar, Inc.	)	ASBCA Nos. 56857, 56950
	)	56962, 57386
Under Contract No. FA8903-04-D-8692	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTION FOR RECONSIDERATION IN PART AND
APPELLANT'S MOTION FOR ENTRY OF JUDGMENT

On 31 May 2012 the government timely moved for reconsideration in part of our 23 April 2012 post-hearing entitlement and quantum decision, *Versar, Inc.*, ASBCA No. 56857 *et al.*, 12-1 BCA ¶ 35,025. The decision sustained in part Versar, Inc.'s appeal from the contracting officer's (CO) denial of its claim under a task order (TO) for heating, ventilation, air conditioning (HVAC) and other work at a Ft. Jackson, South Carolina, Department of Defense elementary school and sustained its appeal from a government claim. We found that appellant was entitled to Prompt Payment Act (PPA) interest computed in accordance with our decision; $9,915.49 in mold removal costs and $2,557.57 in AHU-1 costs if not already paid; $59,536 for HVAC controls; the contract balance as determined by the parties; and Contract Disputes Act (CDA) interest on the foregoing computed as of the CO's 3 November 2008 receipt of appellant's claim. *Id.* at 172,128; *see* 41 U.S.C. § 7109. The Board recently reiterated our reconsideration criteria:

> The general standards we apply to motions for reconsideration are whether the motion is based on newly discovered evidence, mistakes in the findings of fact, or errors of law. Reconsideration is not a chance for a party

> to reargue its position, nor is it granted without compelling reason.

SplashNote Systems, Inc., ASBCA No. 57403, 12-1 BCA ¶ 35,003 at 172,026.

The government challenges our $59,536 HVAC controls award, whereby we sustained in part appellant's claim for extra costs due to a defective amended specification that involved installation of a direct digital control system at the Ft. Jackson, South Carolina project site that would communicate with an existing system at Ft. Stewart, Georgia, but mischaracterized that system. *Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,098-99, findings 18-22, at 172,120.

With regard to entitlement, the government does not now appear to dispute that it issued a defective specification. However, the government had contended in post-hearing briefing that appellant failed to inspect the system at Ft. Stewart pre-proposal or to make a reasonable inquiry whether its proposed system would comply with the contract and that it should be charged with the knowledge it could have obtained from a site visit/inquiry (gov't post-hearing br. at 97). We concluded:

> The amended controls specification required that the controls system be completely compatible with Siemens controls protocol and software and interface and communicate with the Siemens system at Ft. Stewart. However, it did not describe Ft. Stewart's system; erroneously retained the LonWorks and LonMark requirements; and did not state that Siemens was, in practicality, the required, rather than only a recommended, system. Appellant did not consult with Ft. Stewart about its controls system because Andover had reported that its system was compatible through the LonWorks protocol, which the specifications indicated was in place. Regardless, the government is presumed to know its own systems and is responsible for its design specification. It is not reasonable under the circumstances to impose a duty of pre-proposal inquiry upon appellant, which has met its burden to prove that the government's HVAC controls specification was defective.

Versar, Inc., 12-1 BCA ¶ 35,025 at 172,120.

The government alleges that our determination was legal error and asks the Board, for the first time, to take judicial notice of "commonly known facts" that: "Everyone, particularly anyone with experience in [information technology], should have sufficient experience to know and understand that adding new IT systems to an existing IT system

is often fraught with difficulty" (mot. at 11). The government posits that, in view of this common knowledge, appellant unreasonably failed to ask the CO about the actual specifications of the Ft. Stewart system. The government speculates that, although it "loosely described this inquiry as a site visit, in reality the technical questions probably could have been answered in a telephone call between the Ft. Stewart engineering personnel" and appellant's lower tier subcontractors or suppliers (*id.*).[1]

The government alleges that in a 22 September 2006 letter to the CO, appellant's project manager stated that the amended controls specification included conflicting or contradictory requirements. According to the government, this proves that appellant knew about the problem with the amended specification, presumably meaning that it knew prior to submitting its proposal. (Gov't mot. at 10) The government cited this letter in its post-hearing brief and we cited it in our decision (gov't post-hearing br. at 75, proposed finding 230; *Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,098, finding 21). However, the government did not then argue that the letter, sent several months after the 28 April 2006 TO award, reflected any prior knowledge by appellant that the controls specification, which had been amended pre-award on 26 August 2005, was defective. *See Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,096, finding 4, at 172,098, finding 19.

Citing a 25 October 2006 letter that it had not mentioned in its post-hearing brief, but that we had included in our fact findings, *Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,099, finding 22, and referring to alleged unattributed hearsay contained in the letter, the government also contends for the first time that, prior to award, the government's project designer had advised "Tour Andover-C/Tech representatives" that the LON system being considered was not completely compatible with Ft. Stewart's system but that Andover/C-Tech "apparently chose not to share this information with Versar" (gov't mot. at 12). The government contends, nonetheless, that this alleged pre-award knowledge must be imputed to appellant.

With regard to entitlement and quantum, the government alleges that the Board's finding that appellant was injured due to the defective specification was not supported by substantial evidence. Our finding 23, at issue, states in relevant part:

> On 7 December 2006 Mr. Habrukowich submitted a $115,593 request for equitable adjustment (REA) on behalf of Versar (R4, tab 200 at 2995)....The REA stated Andover could not supply software for a BACnet unit cost-effectively and

[1] J.J. Kirlin Company (JJK) was appellant's primary general HVAC subcontractor. Custom Mechanical (Custom) was JJK's primary subcontractor. C/Tech Inc. was Custom's controls subcontractor. Tour Andover Controls (Andover) was the original controls system supplier. *Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,096, finding 4, at 172,098, findings 18, 19.

> DDESS had verbally directed Versar to use Siemens, knowing a cost adjustment was required. Custom was forced to terminate C/Tech and hire Siemens. Andover was not claiming costs. C/Tech's 9 March 2006 agreement with Custom was for $325,900. C/Tech was paid for its labor, material and supplies costs of $64,986.58....On 22 September 2006 Custom issued Siemens a $300,000 purchase order, which took into account a credit for $20,000 in equipment and material supplied to Siemens and $4,000 in labor. According to the REA, Custom claimed a net differential cost impact of $40,987 plus 10% overhead and 10% profit ($8,607), for a $49,594 total (R4, tab 200 at 2999). JJK sought overhead and profit on Custom's amounts at 11.5%, or $5,749. Versar did not claim profit but sought its WERC contract 4.24% handling fee, or $4,193....It did not receive a formal response. (*Id.* at 2997, 3000, 3024, 3027-29, 3033-34, 3036-40, 3042-43, tab 562 at 6877; tr. 2/46-47, 12/207, 209-10)

Versar, Inc., 12-1 BCA ¶ 35,025 at 172,099.

The government contends that there is no cancelled check or other proof that appellant paid the amount at issue to JJK or that JJK paid Custom and Custom paid C/Tech, or that the amount is legally owed to appellant's subcontractor. It cites to testimony by appellant's eventual project manager, Anthony Campbell, that the controls claim documentation does not include back-up pertaining to any demand to appellant from JJK or payment by JJK (tr. 12/205-08).

The government further alleges that the portion of the record cited by the Board does not include any evidence to support its finding, and that the Board did not accept or consider the Defense Contract Audit Agency's (DCAA) report that appellant did not provide requested documentation that the costs claimed for C/Tech had been incurred or were owed. DCAA's audit report identified claim documentation submitted by appellant but DCAA found it to be inadequate (ex. G-175 at 27, ¶ 10). Although it did not raise a specific argument based upon it, the government had cited DCAA's report in post-hearing briefing (gov't post-hearing br. at 77, proposed finding 236). It had not cited the minimal auditor testimony to which it now refers, which, in fact, refers to a quantum response by appellant, albeit unsatisfactory to DCAA (gov't mot. at 8 (citing tr. 14/82-83)). Indeed, we found that "DCAA questioned the controls costs due to alleged lack of adequate documentation." *Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,116, finding 131.

Appellant opposes the government's motion for reconsideration and contends that its arguments were, or could have been, presented earlier and it has not shown that the Board made any legal error. Appellant notes that the TO primarily called for renovating

an HVAC system, not installing an IT network. It asserts that the government's "judicial knowledge" argument that appellant should have telephoned unspecified individuals who might possibly have been able to provide information about Ft. Stewart's IT system is unsupported speculation, and that its constructive knowledge contention is meritless. Appellant also asserts that the government has not shown that the Board made any factual error. Rather, the government has merely disputed the Board's factual inferences, derived from the record. Appellant has not offered any additional proof of payment or of liability for payment but alleges that, when entitlement is apparent, the Board will use its best efforts to award fair damages and quantum proof need not be exact.

Also, appellant has moved for entry of judgment in its favor in the amount of $740,646.19, plus CDA interest from the CO's 3 November 2008 receipt of its claim to date of payment of the principal amount due, which appellant calculates as follows:

Prompt Payment Act Interest

Unpaid Amount:	$657,428.70
Start date:	7/4/2008
End date:	11/3/2008
No. of full months:	3
Days in final partial Month of period:	29
Interest rate on day Period begins	5.125%
Interest compounded monthly per 5 C.F.R. 1315.17	**$11,208.43**

Total Principal to which CDA Interest applies

Unpaid Amount:	$657,428.70
PPA Interest:	$11,208.43
HVAC Controls:	$59,536.00
Mold Removal:	$9,915.49
AHU-1:	$2,557.57
Total:	**$740,646.19**

(App. opp'n & mot. ex. B at 2nd page)

Appellant states, without rebuttal, that the government did not contest its PPA interest and contract balance calculations, but disputed the HVAC controls award and related CDA interest and also contended that the principal amount upon which CDA interest is calculated should be further reduced by a $242,445.49 partial payment it offered to make to appellant after post-hearing briefing, prior to the Board's decision, and

by the associated CDA interest. That payment offer was subject to receipt of a release from appellant, which rejected it accordingly. (App. opp'n & mot. at 3-5, ¶¶ 12, 13, 16, at 11-12, exs. E-G)

In its reply to appellant's opposition, the government now states that appellant knew, prior to submitting its proposal, that there was a problem with the amended controls specification but chose to do nothing about it and that it was the government's specification error that gave rise to appellant's duty to inquire (gov't reply at 7).

On the motion for judgment issue, the government responds that Versar was unreasonable when it declined to provide the release upon which the $242,445.49 payment was contingent, because the release preserved its rights concerning amounts remaining in dispute. The government alleges that, although it did not pay the amount, it satisfied the common law requirements of tender, thus stopping the further accrual of interest. Therefore, as of 8 August 2011, when the government was first prepared to make payment, appellant should not receive any CDA interest on the offered amount. Otherwise, apart from the HVAC controls issue, the government has not challenged appellant's computation of the amount due it.

DISCUSSION

Motion for Reconsideration

Regarding our alleged legal error, in support of its contention that appellant was required to make a pre-proposal visit to Ft. Stewart to determine if its proposed HVAC controls system for the Ft. Jackson, South Carolina, project at hand was compatible with that at Ft. Stewart, the government continues to rely upon *Adkins Construction, Inc.*, ASBCA No. 46081 *et al.*, 96-1 BCA ¶ 28,140, as it did in its post-hearing brief (gov't mot. at 10; gov't post-hearing br. at 97). In that case, which involved claims for additional compensation for installing trim, painting window mullions and the like, the contractor did not comply with a specification's requirement that bidders visit the job site before bidding. Here, we have a defective specification that misrepresented the controls system in place at an off-site military base located in a different state than the project and no specification that required appellant to visit Ft. Stewart. Judicial notice principles do not apply to the government's speculative suggestion that a telephone call from appellant to unidentified personnel at Ft. Stewart might possibly have alerted appellant to the errors in the specification.

With regard to the government's contention that appellant had actual or constructive pre-award knowledge that the controls specification was defective, we noted above that the 26 September 2006 and 25 October 2006 letters it cites do not support its allegation. To the contrary, as we found in our decision, in the 25 October 2006 letter, the project designer wrote to the CO that a change order should issue to engage Siemens

(the HVAC controls provider for the system in place at Ft. Stewart) for the controls work at issue and that "[t]he customer understands that this will be an additive cost contract mod and is fully prepared for this change." *Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,099, finding 22.

Concerning our alleged legal error and factual mistake that appellant was damaged due to the government's defective controls specification, the government cites to Mr. Campbell's testimony acknowledging that the REA back-up did not include a demand from JJK to appellant for payment or evidence that JJK had paid sums claimed. However, Mr. Campbell, a highly credible witness, also testified that he had reviewed the documentation attached to the REA when he took over as project manager and found that the claimed amount accurately reflected appellant's costs, except that appellant had not charged profit (tr. 12/154).

Moreover, we considered DCAA's evidence and noted that it deemed the claim documentation to be inadequate. However, we did not accept its contentions concerning the adequacy of appellant's documentation as dispositive of appellant's right to recover its claimed costs. Appellant submitted an REA and a certified CDA claim incorporating the REA that included back-up documentation. That back-up, which we cited in our finding 23 at issue, included what the record reflects is an invoice, entitled "PINKNEY SCHOOL HVAC RENOVATION, JOB # 06-054, DETAILED BILLING," faxed by C/Tech to Custom on 21 September 2006 in the amount of $64,986.58 (R4, tab 200 at 3027-29; *Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,099). The documents we cited show that the invoice included costs for valves, air flow stations, control dampers and electrical labor, in a total amount close to the $24,000 credit Siemens, successor controls supplier for Custom, gave it against its price. Those items were made available to Siemens, suggesting that Custom had previously paid for them. A 28 November 2006 exchange between C/Tech and appellant's original project manager, which we cited, contains the notation that $64,987 of work had been performed, also consistent with C/Tech's invoice. (R4, tab 200 at 3029, 3034, 3036, 3038-39; *Versar, Inc.*, 12-1 BCA ¶ 35,025 at 172,099, findings 21, 23)

We have reviewed the portion of our decision that sustained appellant's HVAC controls claim in part and the government has not persuaded us that there is any reason to alter it. We have reconsidered, and reaffirm, our decision.

Motion for Entry of Judgment

We found that appellant was entitled to PPA interest computed in accordance with our decision; $9,915.49 in mold removal costs and $2,557.57 in AHU-1 costs if not already paid; $59,536 for HVAC controls; the contract balance as determined by the parties; and CDA interest on the foregoing computed from the CO's 3 November 2008 receipt of appellant's claim. Appellant calculated the PPA interest and contract balance,

included the mold removal and AHU-1 costs, and seeks judgment in the resulting amount of $740,646.19, plus CDA interest from 3 November 2008 until paid. The government did not contest the PPA interest and contract balance calculations, or that the mold removal and AHU-1 costs remained to be paid, but it disputed our HVAC controls award and associated interest. The government also contended that the principal amount upon which CDA interest is calculated should be reduced by the $242,445.49 partial payment it offered to make to appellant and associated CDA interest.

We have reaffirmed our HVAC controls award. Additionally, we reject the government's contention that CDA interest should be reduced by taking into account its conditional tender of a payment that appellant reasonably rejected due to the government's release demand. The CDA is not conditional. It provides:

> Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the [CO] receives the contractor's claim, pursuant to section 7103(a) of this title, until the date of payment of the claim.

41 U.S.C. § 7109(a)(1).

Accordingly, we grant appellant's motion for entry of judgment. The government shall pay it $740,646.19, plus CDA interest from 3 November 2008 until paid.

DECISION

We deny the government's motion for reconsideration and grant appellant's motion for entry of judgment in its favor in the amount of $740,646.19, plus CDA interest from 3 November 2008 until paid.

Dated: 14 August 2012

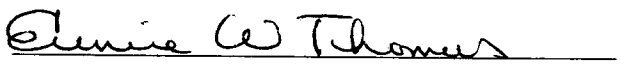
CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 56857, 56950, 56962, 57386, Appeals of Versar, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals